181 (2)

No. 10-570

In the Supreme Court of the United States

JESUS MORA FLORES, PETITIONERS

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the filing of a petition for review in a court of appeals resets the time period during which an alien is allowed to voluntarily depart the United States.

2. Whether a motion to reopen removal proceedings, which "shall be filed within 90 days of the date of entry of a final administrative order of removal," 8 U.S.C. 1229a(c)(7)(C)(i), may instead be filed within 90 days of the issuance of a court of appeals mandate, if the alien has filed a petition for review.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 70-72) is unreported. The decisions of the Board of Immigration Appeals (Pet. App. 84-89) and the immigration judge are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 21, 2010. A petition for rehearing was denied on July 26, 2010 (Pet. App. 74). The petition for a writ of certiorari was filed on October 25, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, an alien who has no lawful immigration status, and who is found to be removable

from the United States, may be eligible for a form of relief known as cancellation of removal. Cancellation of removal may be available to an alien who has been continuously physically present in the United States for at least ten years, has not been convicted of a statutorily specified crime, and has demonstrated good moral character during the required period of physical presence. 8 U.S.C. 1229b(b)(1)(A)-(C). An alien who satisfies these criteria may be permitted to remain in the United States if his removal would cause "exceptional and extremely unusual hardship" to the alien's spouse, parent, or child who is a United States citizen or a lawful permanent resident. 8 U.S.C. 1229b(b)(1)(D). Even if an alien demonstrates eligibility for cancellation of removal, the decision whether to grant that relief is within the Attorney General's discretion. 8 U.S.C. 1229b(b)(1).

b. The INA also provides that the Attorney General may permit a removable alien who satisfies certain statutory criteria "voluntarily to depart the United States at the alien's own expense" in lieu of being removed. 8 U.S.C. 1229c(b)(1). An alien who departs voluntarily is not subject to the five- to ten-year period of inadmissibility applicable to an alien who has previously been removed. See 8 U.S.C. 1182(a)(9)(A). As with cancellation of removal, voluntary departure is granted at the Attorney General's discretion. 8 U.S.C. 1229c(a)(1).

The INA and federal regulations contain provisions designed to ensure that aliens who have been granted voluntary departure depart the United States in a timely fashion. For an alien who is granted voluntary departure at the conclusion of removal proceedings, "[p]ermission to depart voluntarily * * * shall not be valid for a period exceeding 60 days." 8 U.S.C. 1229c(b)(2); see 8 C.F.R. 1240.26(e). An immigration

judge (IJ) who grants voluntary departure must also enter an alternate order of removal. 8 C.F.R. 1240.26(d). If the alien does not depart within the time specified in the order granting voluntary departure, the alternate order of removal becomes final and the alien becomes "ineligible, for a period of 10 years," to receive statutorily specified forms of discretionary relief. 8 U.S.C. 1229c(d)(1)(B).

c. Both the INA and the Attorney General's regulations permit an alien to file one motion to reopen removal proceedings after a final decision has been rendered by the Board of Immigration Appeals (Board). See 8 U.S.C. 1229a(c)(7)(A) and (B); 8 C.F.R. 1003.2(c). The purpose of a motion to reopen is to present "new facts" that may bear on an alien's eligibility for relief. 8 U.S.C. 1229a(c)(7)(B); 8 C.F.R. 1003.2(c)(1). Subject to statutory exceptions not relevant here, any motion to reopen "shall be filed within 90 days of the date of entry of a final administrative order of removal." 8 U.S.C. 1229a(c)(7)(C)(i). An alien may withdraw his request for voluntary departure, provided that the motion is made before the voluntary departure period expires. *Dada* v. *Mukasey*, 554 U.S. 1, 6-7 (2008).

2. Petitioners, a married couple, are natives and citizens of Mexico. Administrative Record 165, 672, 793 (A.R.). They entered the United States illegally in June 1992. A.R. 672, 793. In March 2003, U.S. Immigration and Customs Enforcement (ICE) charged petitioners with being removable under 8 U.S.C. 1182(a)(6)(A)(i), for being present in the United States without having been admitted or paroled. A.R. 672, 793.

Petitioners conceded that they were removable as charged, A.R. 166, 184, but they sought relief in the form of cancellation of removal or, in the alternative, volun-

tary departure. A.R. 166. The IJ concluded that petitioners had failed to meet their burden to demonstrate that their removal would result in "exceptional and extremely unusual hardship" to their United States-citizen children. A.R. 168-172. The IJ explained that the childrens' separation from their cousins and friends was "the ordinary consequence of the parents' removal," and that reduced educational opportunities in Mexico do not constitute an exceptional and extremely unusual hardship. A.R. 170. The IJ acknowledged that cancellation of removal might be warranted if a qualifying relative had a serious health issue that could not be treated abroad, A.R. 171, but the IJ concluded that petitioners had not shown that their daughter's asthma condition could not be treated in Mexico. A.R. 171-172.

The IJ determined, however, that petitioners were eligible for voluntary departure, and he granted petitioners the statutory maximum of 60 days to depart the United States. A.R. 172-174.

3. The Board dismissed petitioners' appeal. Pet. App. 76-82. The Board agreed with the IJ's determination that petitioners did not qualify for cancellation of removal because they failed to establish that their children would suffer exceptional and extremely unusual hardship if petitioners were removed to Mexico. *Id.* at 77-78. The Board concluded that neither reduced educational opportunities in Mexico nor separation from extended family qualified as exceptional and extremely unusual hardships facing petitioners' children. *Id.* at 78-79. The Board also concluded that petitioners did not provide sufficient evidence to show that asthma medication for one of their daughters would be unavailable or prohibitively expensive in Mexico. *Id.* at 79-80.

The Board reestablished petitioners' voluntary departure period for 60 days from the issuance of its August 8, 2008 decision. Pet. App. 81.

4. On September 8, 2008, petitioners filed a petition for review. The court of appeals granted a temporary stay of removal, and it also stayed the 60-day voluntary departure period. No. 08-73848 Docket entry Nos. 1-2 (9th Cir.). On February 26, 2009, the court of appeals dismissed the petition for review. Pet. App. 64-66. The court concluded that petitioners "failed to raise a colorable constitutional or legal claim to invoke [federal court] jurisdiction over this petition." *Id.* at 64. The temporary stays of removal and of the 60-day voluntary departure period expired when the court of appeals issued its mandate on May 19, 2009. *Id.* at 65-66, 68.

5. On July 15, 2009, petitioners filed with the Board a motion to withdraw their request for voluntary departure. A.R. 109-113. On July 20, 2009, petitioners filed another motion with the Board to reopen the proceedings so that they could present additional evidence of hardship to their children. A.R. 20-34.

The Board denied both motions. Pet. App. 84-89. The Board concluded that petitioners' motion to withdraw their request for voluntary departure was untimely. *Id.* at 86. The Board explained that when petitioners filed their petition for review in the court of appeals on September 8, 2008, approximately one half of their permitted 60-day voluntary departure period had already elapsed. *Id.* at 85-86. Although the court of appeals had stayed petitioners' voluntary departure period, the court of appeals did not reset the voluntary departure period back to day one. *Id.* at 86. The clock restarted when the court of appeals issued its mandate on May 19, 2009, and the 60-day voluntary departure

period therefore expired more than a month before petitioners filed their motion to withdraw their request for voluntary departure on July 15, 2009. *Id.* at 85-86.

The Board also concluded that petitioners' motion to reopen the proceedings was untimely. Pet. App. 86. The Board explained that the motion to reopen was filed 11 months after the Board's August 8, 2008 order of removal, exceeding the statutory 90-day period in which a motion to reopen must be filed. *Ibid.*; see 8 U.S.C. 1229a(c)(7)(C)(i). The Board rejected petitioners' argument that they had 90 days from the issuance of the court of appeals mandate within which to file a motion to reopen. Pet. App. 86. The Board reasoned that the time limit for filing a motion to reopen is independent of the proceedings in the court of appeals. *Id.* at 86-87 (citing *Stone* v. *INS*, 514 U.S. 386, 405 (1995), and *Dela Cruz* v. *Mukasey*, 532 F.3d 946, 949 (9th Cir. 2008) (per curiam)).

The Board further concluded that even if the proceedings were reopened, petitioners would not qualify for cancellation of removal, because the additional evidence they sought to present did not demonstrate a situation so exceptional as to meet their statutory burden. Pet. App. 88. The Board therefore declined to exercise its regulatory authority to reopen administrative proceedings *sua sponte*. *Id.* at 87.

6. Petitioners filed another petition for review in the court of appeals, seeking review of the Board's denial of reopening. The court of appeals denied that petition. Pet. App. 70-72. The court concluded that the Board properly denied petitioners' motion to withdraw their request for voluntary departure, given that the voluntary departure period had already expired when the motion was filed. *Id.* at 71. The court of appeals also

concluded that the Board did not abuse its discretion in denying petitioners' motion to reopen as untimely, because a motion to reopen must be filed within 90 days of the entry of a final order or removal. *Id.* at 70-71 (citing 8 U.S.C. 1229a(c)(7)(C)(i)). The court of appeals rejected petitioners' argument that if an alien files a petition for review of a final order of removal, the 90-day statutory period for filing a motion to reopen begins when the court of appeals issues its mandate, explaining that this argument was foreclosed by circuit precedent. *Id.* at 71 (citing *Dela Cruz*, *supra*).

ARGUMENT

Petitioners contend (Pet. 27-35) that the statutorily specified time period for voluntary departure should be reset when an alien files a petition for review in a court of appeals. Petitioners further contend (Pet. 35-56) that the statutorily specified 90-day period in which an alien may file a motion to reopen proceedings before the Board should run from the issuance of the court of appeals mandate, not from the Board's entry of an order of removal. The court of appeals correctly rejected these arguments, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. Petitioners contend (Pet. 27-35) that their 60-day voluntary departure period should have been reset when they filed their petition for review in the court of appeals, with that entire 60-day period beginning to run anew when the court of appeals issued its mandate. Petitioners cite no authority in support of their argument, and it is incorrect.

An alien is permitted to withdraw his request for voluntary departure only if the motion is made before

the voluntary departure period expires. See *Dada* v. *Mukasey*, 554 U.S. 1, 5-6 (2008). Petitioners do not dispute that, unless their 60-day voluntary departure period was reset when they filed a petition for review in the court of appeals, their motion to withdraw their request for voluntary departure was untimely.

Although some courts have held that a court of appeals may *stay* an alien's voluntary departure period while a petition for review is pending,[1] no court has held that the mere filing of a petition for review automatically resets an alien's voluntary departure period back to day one. That is unsurprising, given that "[a]uthority to extend the time within which to depart voluntarily * * * is only within the jurisdiction of" specified ICE officials. 8 C.F.R. 1240.26(f).

Petitioners' argument is based on the premise that "voluntary departure is meant to be a * * * reward." Pet. 31. To the contrary, as the Court explained in *Dada*, voluntary departure "is an agreed-upon exchange of benefits, much like a settlement agreement." 554 U.S. at 19. In exchange for various benefits, including

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[1] In *Dada*, this Court acknowledged disagreement in the courts of appeals regarding whether a court of appeals may stay a period of voluntary departure pending consideration of a petition for review on the merits. See 554 U.S. at 10-11. That issue is not presented in this case. The Board's order granting petitioners voluntary departure was issued on August 8, 2008. Pet. App. 76-82. Thus, when petitioners filed their petition for review on September 8, 2008, 31 days of the 60-day voluntary departure period had already elapsed. Even assuming that the court of appeals had the authority to stay petitioners' 60-day voluntary departure period, petitioners had only 29 days remaining within which to file a timely motion to withdraw their voluntary departure request. Petitioners, however, filed their motion on July 15, 2009, which was 55 days after the court of appeals issued its mandate on May 19, 2009.

not being subject to the five- to ten-year inadmissibility periods applicable to aliens who have previously been removed, see 8 U.S.C. 1182(a)(9)(A), an alien promises to "arrange for departure, and actually depart, within the 60-day period," *Dada*, 554 U.S. at 19. Far from being a reward, the short 60-day period in which petitioners were allowed to settle their affairs and depart the United States was a term of an agreement with the United States, for which petitioners received significant benefits.

Petitioners further contend (Pet. 31-32) that a petition for review should reset the voluntary departure period because aliens would otherwise have insufficient time to consider whether to seek judicial review. That argument is premised on a misunderstanding of the law. An alien does not forfeit his ability to challenge an order of removal if he complies with a voluntary departure order. An alien granted voluntary departure may file a petition for review within the statutory 30-day period, and then depart within the original 60-day voluntary-departure period as promised. By doing so, he is afforded the benefits of voluntary departure while honoring his commitment to timely depart, and he may continue to pursue his claims in the court of appeals. See, *e.g.*, *Rivera* v. *Mukasey*, 508 F.3d 1271, 1277 (9th Cir. 2007) (alien may voluntarily depart during pendency of appellate proceedings without prejudicing appeal); cf. *Nken* v. *Holder*, 129 S. Ct. 1749, 1755 (2009) (explaining that, in enacting the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, Congress lifted the bar to a court of appeals adjudicating a petition for review after petitioning alien has departed).

Petitioners have identified no authority supporting their argument that their 60-day voluntary departure period should have been reset when they filed a petition for review in the court of appeals. The court of appeals correctly rejected that argument, and further review is not warranted.

2. Petitioners also contend (Pet. 35-56) that if an alien files a petition for review, the statutorily specified 90-day period during which an alien may file a motion to reopen removal proceedings runs from the issuance of the court of appeals' mandate, rather than from the Board's issuance of a final order of removal. The court of appeals correctly rejected that argument, and the issue does not warrant this Court's review.

a. Under 8 U.S.C. 1229a(c)(7)(C)(i), with specific statutory exceptions not relevant here, an alien who seeks to reopen his immigration proceedings must file a motion to reopen "within 90 days of the date of entry of a final administrative order of removal." An order of removal becomes final upon the dismissal of an appeal by the Board. *Stone* v. *INS*, 514 U.S. 386, 390 (1995); 8 U.S.C. 1101(a)(47)(B)(i); 8 C.F.R. 1241.1. In this case, the administrative order of removal became final on August 8, 2008, when the Board sustained the IJ's order. Pet. App. 76-82. Petitioners did not file their motion to reopen until July 20, 2009, many months after the time period for filing the motion had expired. There is no support for petitioners' argument that the 90-day period did not begin to run until the court of appeals issued its mandate. Indeed, petitioners' argument is inconsistent with this Court's interpretation of the INA in *Stone*.

In *Stone*, the Court held that the filing with the Board of a motion to reopen proceedings or to reconsider does not toll the statutory time limit for filing a

petition for review. The Court held that a removal order is "final when issued" by the Board, and the finality of the order "is not affected by the subsequent filing of a motion to reconsider." 514 U.S. at 405. That conclusion stemmed from the INA's consolidation provision, which provides that "[w]hen a petitioner seeks review of an order [of removal] under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order." 8 U.S.C. 1252(b)(6). The consolidation provision contemplates that an alien might file multiple petitions for review: one from the Board's final order of removal, and another from the Board's decision denying a motion to reopen or reconsider. *Stone*, 514 U.S. at 394.

The decision of the court of appeals in this case follows logically from *Stone*. As other courts have recognized, the Court's reading of the INA's consolidation provision in *Stone* "demonstrates Congress's intent that petitions for review and motions for reconsideration [or to reopen] be filed concurrently." *Randhawa* v. *Gonzales*, 474 F.3d 918, 921 (6th Cir. 2007); see also *Chen* v. *Gonzales*, 492 F.3d 153, 155 (2d Cir. 2007) (per curiam) ("Congress * * * contemplated that a motion to reopen or reconsider might be filed concurrently with a petition for review."). As a result, the courts of appeals to have considered the issue—including the Ninth Circuit in a published opinion that was binding on the court of appeals in this case—has concluded that just as the filing of a motion to reconsider did not affect the statutory period for filing a petition for review in *Stone*, "[t]he filing of a petition for review in [the court of appeals] does not toll the statutory time limit for filing a motion to reopen before the [Board]." *Dela Cruz* v. *Mukasey*,

532 F.3d 946, 947 (2008); see also *Chen*, 492 F.3d at 155; *Randhawa*, 474 F.3d at 922.

Petitioners' argument that the mere filing of a petition for review somehow renders the Board's removal order nonfinal is incorrect. As various courts of appeals have explained, a court of appeals has jurisdiction to entertain a petition for review only if the petition seeks review of a *final* removal order. See 8 U.S.C. 1252(a) and (d). If an order of removal "is not final until [a court of appeals] has issued its decision, then [the court] would have no jurisdiction over a petition for review until [it] had already decided it," which "cannot be the case." *Chen*, 492 F.3d at 155; see also *Randhawa*, 474 F.3d at 921 (holding that a reading of the consolidation provision that would render Board decisions "final orders" reviewable by a court of appeals, but not "final administrative orders" starting the clock for filing a motion to reopen, "makes no sense").

Petitioners have identified no authority supporting their position that the 90-day statutory period during which an alien may file a motion to reopen removal proceedings should run from the issuance of a court of appeals mandate on a petition for review of the Board's final order of removal, and not from the Board's issuance of the final order itself, as the INA provides. 8 U.S.C. 1229a(c)(7)(C)(i). Further review is therefore unwarranted.

b. Petitioners' argument (Pet. 40-45) that the refusal by the court of appeals to extend the 90-day statutory period for filing a motion to reopen violates the Due Process Clause, including its equal protection component, by "cut[ting] off post-order rights of review" does not warrant further consideration. Petitioners' equal protection argument is illogical. By asserting that an alien

who files a petition for review should have a longer period of time in which to file a motion to reopen, petitioners seek *more favorable* treatment than aliens who choose not to pursue federal court review of their administrative proceedings.

Furthermore, because both voluntary departure and cancellation of removal are discretionary forms of relief, there is no constitutionally protected property or liberty interest in obtaining such relief through a motion to reopen. See, *e.g.*, *Garcia-Mateo* v. *Keisler*, 503 F.3d 698, 700 (8th Cir. 2007) ("[T]here is no constitutionally protected liberty or property interest in discretionary relief from removal."); *Dekoladenu* v. *Gonzales*, 459 F.3d 500, 508 (4th Cir. 2006) (no property or liberty interest can exist when relief sought is discretionary), cert. denied, 554 U.S. 917 (2008); *Naeem* v. *Gonzales*, 469 F.3d 33, 38-39 (1st Cir. 2006) (alien has no protected property or liberty interest in discretionary relief of voluntary departure, reopening, or adjustment of status). Petitioners' due process claim therefore lacks merit.

c. Finally, this case would not be an appropriate vehicle in which to address petitioners' claim because the Board determined that even if petitioners' motion to reopen had been timely filed, petitioners would not be entitled to cancellation of removal. Pet. App. 87-88.

Petitioners sought to reopen their proceedings before the Board to present additional evidence showing that petitioner Cervantes Mora was physically ill, and to present further evidence showing that petitioners' children would be deprived of superior educational opportunities if petitioners were removed to Mexico. Pet. App. 87-88. The Board concluded, however, that the additional evidence petitioners sought to introduce would not demonstrate that medical treatment was unavailable to

petitioner Cervantes Mora in Mexico, nor would it demonstrate that her condition would more severely affect her United States-citizen children if she were treated in Mexico rather than the United States. *Id.* at 88. The Board further concluded that petitioners' new evidence relating to the children's assimilation in the United States, and to one child's acceptance into a gifted educational program, did not create a situation so exceptional "that resort to th[e] extraordinary discretionary remedy [of cancellation of removal] is warranted." *Ibid.*

Because the outcome of the case would not change even if petitioners were allowed to reopen their proceedings before the Board, this Court's review is not warranted. Cf. *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956) ("This Court * * * reviews judgments, not statements in opinions.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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